

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MARINO DeLEON, :  
 :  
 Plaintiff, : No. 4:CV-06-01567  
 :  
 v. : (McClure, J.)  
 :  
 LINDA S. McMAHON, : (Magistrate Judge Smyser)  
 Acting Commissioner of :  
 Social Security,<sup>1</sup> :  
 Defendant. :

**ORDER**

February XX, 2007

**BACKGROUND:**

On August 11, 2006, plaintiff, pro se, commenced this civil action under 42 U.S.C. §§ 405(g). Plaintiff appeals the Commissioner's decision to deny disability insurance benefits and supplemental security income.

The matter was initially referred to United States Magistrate Judge J. Andrew Smyser.

On December 4, 2006, the magistrate judge ordered plaintiff to show cause on or before January 4, 2007 why the case should not be dismissed based on a

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<sup>1</sup>Linda S. McMahon became the Acting Commissioner of Social Security, effective January 20, 2007, to succeed Jo Anne B. Barnhart. Under Fed.R.Civ.P. 25(d)(1) and 42 U.S.C. 405(g), Linda S. McMahon is automatically substituted as the defendant in this action.

failure to serve defendant with summons and complaint. (Rec. Doc. No. 3.)

On January 22, 2007, Magistrate Judge Smyser filed a three-page report and recommendation that the complaint be dismissed based on plaintiff's failure to serve defendant with summons and complaint. (Rec. Doc. No. 4.)

On February 5, 2007, rather than serve objections to the magistrate judge's report and recommendation, the plaintiff filed a motion to enlarge time to serve complaint and summons. (Rec. Doc. No. 5.)

Now, for the following reasons, we will adopt the magistrate's report but not the recommendation that the complaint be dismissed. We will grant plaintiff's motion for an enlargement of time to serve the summons and complaint.

## **DISCUSSION:**

Rule 4(m) of the Federal Rules of Civil Procedure states that if service of the summons and complaint is not made upon defendant within 120 days after the filing of the complaint, the court shall dismiss the action without prejudice or direct that service be made within a specified time.

We agree with the magistrate judge's report that as of January 22, 2007, dismissal was appropriate. Plaintiff had failed to serve the complaint within the 120 days time period provided by Rule 4(m). Furthermore, rather than simply

dismiss the complaint, the magistrate judge gave plaintiff one more opportunity to justify the failure to serve the complaint. Plaintiff failed to respond within the time frame set out in the order. Thus, dismissal was appropriate at this time.

Yet, after the magistrate judge filed his report and recommendation, the plaintiff has requested an enlargement of time to serve the summons and complaint. Because the plaintiff is proceeding pro se, we will give the plaintiff one more opportunity to serve the summons and complaint on defendant and order that service be made by February 21, 2007.

Plaintiff is directed to follow Rule 4(i) of the Federal Rules of Civil Procedure which governs serving the United States and its agencies. Plaintiff is also directed to Rule 4(l), which requires the plaintiff to make proof of service to the court if service is not waived. Similarly, Rule 4.1 of the Local Rules of the Middle District of Pennsylvania requires an affidavit of service to be filed within ten days after service is made. Failure to comply with any of these rules while making service will result in the case being dismissed without prejudice pursuant to Rule 4(m).

Finally, we note that plaintiff's complaint is confusing. The caption and paragraph three list the plaintiff as "Marino DeLeon." (Rec. Doc. No. 1.) Yet, paragraph one lists the plaintiff as Alvin Lewis and gives his social security

number. (Id.) We are unsure which is the true plaintiff and whether the correct social security number has been listed, and so may the defendant if served with such a complaint. Therefore, it might be in plaintiff's interest to file an amended complaint to clarify this discrepancy.

**NOW, THEREFORE, IT IS HEREBY ORDERED THAT:**

1. United States Magistrate Andrew Smyser's Report is adopted in full but his recommendation that the complaint be dismissed is not adopted. (Rec. Doc. No. 4).
2. Plaintiff's motion to enlarge time to serve complaint and summons is GRANTED. (Rec. Doc. No. 5.)
3. Plaintiff is directed to serve defendant in compliance with Rule 4(i) of the Federal Rules of Civil Procedure by February 21, 2007.  
  
Furthermore, plaintiff is directed to file proof of service with the court in compliance with Rule 4(l) of the Federal Rules of Civil Procedure and Rule 4.1 of the Local Rules of the Middle District of Pennsylvania within ten days after service is made. Failure to either properly serve the complaint on defendant or properly file proof of service with the

court within the specified time frames will result in the complaint being dismissed without prejudice.

s/James F. McClure, Jr.  
James F. McClure, Jr.  
United States District Judge